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84-160

CASE NO._____

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

THE BEAUFORT GAZETTE,
A SOUTH CAROLINA CORPORATION

PETITIONER

-VS-

KEITH MERRY DELOACH,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTION

Do the First and Fourteenth Amendments to the United States Constitution require a court to make its own independent evaluation of all the evidence as to actual malice in a libel action?

PARTIES

1. Keith Merry Deloach, an individual 25 years of age residing in Beaufort, South Carolina.
2. The Beaufort Gazette Corporation, a South Carolina corporation.[1]

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[1] Beaufort Gazette Corporation is a wholly owned subsidiary of The News and Observer Publishing Co., Inc., a North Carolina corporation. Its affiliates include one South Carolina corporation, The Island Packet, Inc. and eight North Carolina corporations, The Mountaineer Publishing Co., Inc., Herald Publishing Co. of Smithfield, Inc., The Mt. Olive Printing and Publishing Co., Inc., The Cary News Corporation, Benson Newspapaper Printing, Inc., Ad-Pak of N.C., Ltd., Raleigh Warehouse and Distributing, Inc. and Raleigh Delivery Service.

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TABLE OF AUTHORITIES

1. Bose Corp. v. Consumers Union of U.S., Inc. ____ U.S. _____, 104 S.Ct. 1949, _____ L.Ed. ____ (1984)

OPINION BELOW

The opinion of the court below, Keith Merry Deloach v. Beaufort Gazette, No. 22090 (Sup. Ct. S.C., April 30, 1984), has not been reported yet in either the South-eastern Reporter or the South Carolina Reporter. It is in the Appendix at page 12a.

JURISDICTION

The opinion sought to be reviewed was rendered and entered on April 30, 1984 by the South Carolina Supreme Court, which is South Carolina's court of last resort. This petition for certiorari is within 90 days of the date of the opinion.

The statutory provision conferring on this Court's jurisdiction to review the opinion by writ of certiorari is 28 U.S.C.A. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution is as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redresss of grievances.

The Fourteenth Amendment to the United States Constitution in pertinent part is as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ...

STATEMENT

This action is one for libel and invasion of privacy brought against a newspaper. The basis of the complaint was the publication by the newspaper of a brief article which recited that the plaintiff had been arrested for assault and battery as a result of a fist fight outside a local night spot. Although the plaintiff had been involved in a fist fight at the time and place in question, which resulted in the filing with the police of a complaint against him, he had not been named in a warrant and had not been arrested.

At the trial the jury returned a verdict which included punitive damages and therefore rested upon a finding of actual malice.

The newspaper appealed. assigning error among other things to the trial judge's failure to grant its motions for nonsuit directed verdict and judgment notwithstanding the verdict based upon the ground that the evidence was insufficient to prove actual malice.

The South Carolina Supreme Court affirmed the lower court's rulings on these motions and ruled that because of that affirmance it was unnecessary to consider any assignments of error relating to the invasion of privacy claim.

In arriving at its decision that the plaintiff had proven actual malice, the South Carolina Supreme Court considered the evidence in a light most favorable to the plaintiff. It did not recognize the obligation imposed by the First and Fourteenth Amendments to the United States Consti-

tution, as articulated in Bose Corp. v. Consumers Union of U.S. Inc., ____ U.S. ____, 104 S.Ct. 1949, ____ L.Ed. _____ (1984), to undertake an independent evaluation of all the evidence on this issue.

The purpose of this petition for certiorari is to seek an order vacating the opinion of the South Carolina Supreme Court and remanding the case to that court for a decision applying the correct standard of review.

In the trial court and in the South Carolina Supreme Court the petitioner preserved its rights to pursue the issue now raised.

In the lower court this occurred in the petitioner's answer, which set up a First Amendment defense. Also, it occurred upon the petitioner's motions for nonsuit, directed verdict and judgment notwithstanding the verdict.

In the South Carolina Supreme Court the issue was presented through the petitioner's exception which assigned error to the trial judge's refusal to grant these motions.

REASON FOR GRANTING PETITION

The reason for granting this petition is that the South Carolina Supreme Court's opinion conflicts with this Court's standard for review set forth in Bose Corp. v. Consumers Union of U.S., Inc. ____U.S.____, 104 S.Ct. 1949, 1965,_____L.Ed._____ (1984). The South Carolina Supreme Court applied an incorrect standard of review in determining that the plaintiff had proven actual malice in his libel action. Its standard was whether the evidence construed in a light most favorable to the plaintiff could support a finding of actual malice. The correct standard as set forth in Bose, supra, which arises under the First Amendment as applicable to the States through the Fourteenth Amendment, is whether all the evidence reviewed

in an evenhanded fashion as to both parties is sufficient for such a finding.

In Bose , the Court held that in a libel action the First Amendment requires an appellate court to determine independently whether all of the facts are sufficient to support a verdict based on actual malice. The Court declared that

> [t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Bose , supra. at 104 S.Ct. 1965.

The holding in Bose establishes that the role of the reviewing court is not limited simply to a determination

of whether the evidence construed in a light most favorable to the plaintiff can support a verdict based on actual malice.

The South Carolina Supreme Court was probably unaware of the Bose opinion at the time of its decision in this case. The Bose case was decided by the United States Supreme Court on the same day that the present action was decided by the South Carolina Supreme Court. Without the guidance of the Bose decision, the South Carolina Supreme Court applied an incorrect standard of review. It applied the standard mandated by South Carolina common law for appellate review of all jury verdicts, as follows:

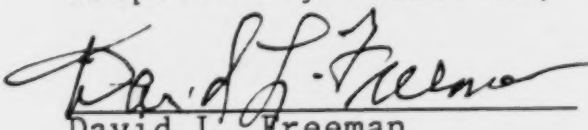
> For the purpose of this appeal, this court must view the evidence in the light most favorable to the plaintiff.

Deloach v. Beaufort Gazette, No. 22090 Sup.Ct. S.C., April 30, 1984), p.8.

That standard did not provide the appellate review required by the First Amendment to the United States Constitution.

The standard of review applied by the South Carolina Supreme Court was erroneous and its opinion should be vacated and this case should be remanded to that court for decision anew under the correct standard.

Respectfully submitted,



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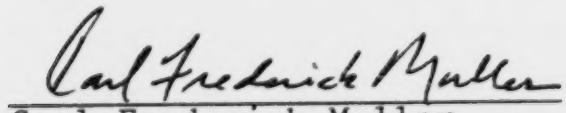

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A P P E N D I X

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Keith Merry Deloach,

Plaintiff-Respondent,

-vs-

The Beaufort Gazette, a South Carolina corporation,

Defendant-Appellant.

Appeal From Beaufort County

George Bell Timmerman, Judge

Opinion No. 22090

Heard February 10, 1984

Filed April 30, 1984

AFFIRMED

H. Fred Kuhn, Jr. and Louis Dore, both of Moss, Bailey, Dore & Jessee, of Beaufort, for Plaintiff-Respondent.

David L. Freeman and Carl F. Muller, both of Wyche, Burgess, Freeman & Parham, of Greenville, for Defendant-Appellant.

LITTLEJOHN, A.J.: Plaintiff, Keith Merry Deloach, (a private citizen) brought this action against The Beaufort Gazette, a newspaper published at Beaufort, South Carolina. He alleges two causes of action, (1) for libel and (2) for invasion of privacy. The invasion of privacy action is bottomed on the factual situation alleged to constitute libel. The case was tried before a jury which rendered a general verdict for both actual and punitive damages against the Gazette. The Gazette appeals raising issues concerning the sufficiency of evidence of actual malice and the judge's charge to the jury on (1) malice, (2) burden of proof, (3) clear and convincing evidence standards, and (4) standards of fault. We affirm.

On Saturday night, the plaintiff engaged in a difficulty described as a fight or a scuffle with Kim Mickel out-

side a local night spot. Mickel reported the incident to the City Police but did not swear out a warrant for the plaintiff. The police did fill out an incident report form. Plaintiff was never arrested and never charged with any crime in relation to the incident.

On the following Monday morning, a Gazette reporter met with Lieutenant Palmer of the City Police Department to go over police "incident reports" accumulated over the weekend. Two days later, on Wednesday, the following article appeared in the Gazette:

> A Burton man was arrested by Beaufort Police Monday charged with assault and battery. Keith Deloach, 21, of Jones' Trailer Park was arrested on a warrant

signed by Kim Mickel, 20, of 701 A Congaree Street, Beaufort, police reported. Deloach is charged with striking Mickel as he walked home from Sans Souci Restaurant about 11:00 P.M. Saturday.

On the following Thursday, the Gazette printed a correction as follows:

> The Beaufort Gazette erroneously reported Wednesday that Keith Deloach, 21 of Jones' Trailer Park, Burton, has been arrested and charged with assault and battery. Deloach has neither been arrested nor charged. The Gazette regrets the error.

It was the testimony of the reporter

that Lieutenant Palmer told him "... that Kim Mickel had come in and had, in fact sworn out a warrant." He also testified that Lieutenant Palmer told him "...that Deloach was, in fact, arrested."

Lieutenant Palmer gave a different version of what transpired at the meeting on Monday morning. He denied having told the reporter that the plaintiff had been arrested or charged or that a warrant had been issued. Furthermore, the Lieutenant denied telling the reporter anything that could have led him to believe that the plaintiff had been arrested or charged or had a warrant issued for his arrest. He further said that the reporter came into the Police Department almost everyday and that whenever he was there, he always checked the public arrest docket.

The reporter testified that it was his usual practice to check the public arrest docket, which was in an adjoining room and easily available to him, before writing a story. On this occasion, he did not, ostensibly because of an eleven o'clock deadline. He testified that, after learning of this lawsuit, he inadvertently destroyed the notes which he took during the meeting with Lieutenant Palmer. He also acknowledges that he failed to file a report in accordance with the Gazette standard procedure which required him to explain the inaccuracy of this story.

The answer of the Gazette raises the defenses of a limited denial and a plea that the publication was privileged under the Constitutions of the United States and of South Carolina, and under the South Carolina

Common Law because it was made in good faith without malice as an event of public concern.

The issues which command the most attention of the court are set forth in Questions I and II of Gazette's brief. It is argued that the evidence does not support a finding of actual malice such as to warrant a verdict in either of the actions for actual or punitive damages. For the purpose of this appeal, this court must view the evidence in the light most favorable to the plaintiff. That evidence raised a jury issue on a factual matter which had been settled by the jury. Townsend Associates, Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). The rule for proof of malice is well established and is included in Request to Charge Number 8, submitted to the court by Gazette as follows:

> For the plaintiff to show actual malice it must appear that the publication was published with knowledge of its falsity or with reckless disregard to whether or not it was false.
>
> (Emphasis added.)

This charge is consistent with the rule announced in New York Times Company v. Sullivan, 276 U.S. 254, 279-80, 84 S.Ct. 710, 726 (1964). The argument of counsel for Gazette seems to disregard the testimony of Lieutenant Palmer. It is obvious that the jury did not. In light of Lieutenant Palmer's version of what he told the reporter and in light of that which he denies having told the reporter, it is clearly inferable that the reporter had a high degree of awareness of the probable falseness of the statement he printed or had serious

doubts as to its truth. St. Amant v. Thompson, 390 U.S. 727, 731-33, 88 S.Ct. 1323, 1325-26 (1968).

At first blush, it would appear that the ruling is inconsistent with the writer's dissent in Jones v. Sun Publishing Co., 278 S.C. 12, 23, 292 S.E.2d 23, 28 (1982)(Littlejohn, J., dissenting). The different result is required because in Jones there was no testimony the equivalent of that which Lieutenant Palmer gave.

Having determined that the court properly submitted the issue to the jury, we proceed to the other questions raised by the Gazette.

The judge, at the commencement of the trial, undertook to give to the jury a preliminary statement in which some facets of the law were discussed. This is a rather dangerous undertaking by a judge because issues of law are never settled until all evidence is

submitted. In that preliminary statement, the judge, in referring to law of defamation, said, "The law of South Carolina has said that libel is the malicious publication but actually in reality the law of South Carolina has considered malice as a mere formality." While the statement might have been more properly omitted, we do not think that it is reversable error requiring a new trial in the light of the complete and accurate charge on malice just before the jury began its deliberation. The charge should always be considered in its entirety. Priest v. Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976).

The Gazette submits further that the judge placed the burden of proof on the issue of liability on the Gazette. This is a strained interpretation of

what the judge said. In substantiation of his argument, counsel quotes a portion of the judge's initial charge. If such be questionable or even error, it was corrected in the final charge wherein the judge said:

> ...Applying that pre-requisite, the evidence must prove that the newspaper in this case was at fault in publishing a defamatory falsehood that was injurious to the plaintiff. Without such proof, there could be no liability under the constitution as interpreted in the Gertz case by the United States Supreme Court, so far as any award for actual damages may be concerned.
>
> Now, if you find that the evidence fails to prove that the defendant was at fault

in publishing the article in question, that is to say, if you find that the evidence fails to prove that the defendant acted wrongfully in publishing the article, then the defendant would not be liable for any damages that the article may have caused the plaintiff. At fault means in the wrong.

While it might have been better had the judge stated "the plaintiff must prove" instead of "...the evidence must prove...", it is not plausable to argue that this charge of the law cast any burden upon the Gazette. Compare this finding with that in State v. Cooper, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983). Taking the charge as

a whole, the jury certainly could not have gained the impression that the Gazette was required to prove that it was not at fault. Priest, 266 S.C. at 324, 223 S.E.2d at 38.

The Gazette next submits that the trial judge erred in failing to amplify his charge concerning the standard of clear and convincing evidence. He stated:

> For the plaintiff to show actual malice in this case it must have been that the publication was published with intention of falsity or with reckless disregard as to whether it was false or not and that must be established by clear and convincing proof. (Emphasis added.)

This is consistent with the rule

announced in Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-49, 94 S.Ct. 2997, 3011 (1974).

The judge had previously discussed "proof by the preponderance of the evidence." A jury could only have been given the impression that "clear and convincing" was a higher degree of proof. Failure to elaborate on these terms was not error. While we hold no error, we add that for actual damages in a libel action neither New York Times v. Sullivan nor Gertz v. Robert Welch, Inc. require the states to adopt a degree of proof more demanding than by "a preponderance of the evidence" where a private individual is involved. For a private individual to recover punitive damages in a libel action, however, he must prove actual malice by clear and convincing evidence. Gertz, 418 U.S. at 348-49, 94 S.Ct. at 3011.

Inasmuch as the verdict of the jury based on the libel cause of action must stand, any discussion of the cause of action based on the invasion of privacy becomes surplusage. We find the exceptions without merit and the appeal is dismissed.

AFFIRMED.

LEWIS, C.J., NESS, GREGORY and HARWELL, J.J., concur.

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In the

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October Term, 1984

THE BEAUFORT GAZETTE,
A South Carolina Corporation,

Petitioner,

vs.

KEITH MERRY DELOACH,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the First and Fourteenth Amendments to the United States Constitution require a court to make its own independent evaluation of all the evidence as to actual malice in a libel action?

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SUMMARY OF ARGUMENT

The South Carolina Supreme Court did conduct an independent evaluation of the evidence in the record and determined that there was clear and convincing evidence of actual malice.

ARGUMENT

In Bose Corp. v. Consumers Union of U.S., Inc., _____ U.S. _____, 104 S.Ct. 1949, _____ L.Ed. _____ (1984) this Court held that appellate judges in libel cases must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

The South Carolina Supreme Court did perform an independent appellate review of the evidence in this case. The evidence of actual malice consisted of the following:

(1) The newspaper's admission in its retraction that the article about the plaintiff was erroneous and that he had been neither arrested nor charged. (Petition, p. 12d).

(2) The newspaper reporter's testimony that Lt. Palmer of the City Police Department had told him that the plaintiff had been arrested. (Petition, p. 12d-12e).

(3) Lt. Palmer's testimony that he did

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not tell the reporter that the plaintiff had been arrested or charged. (Petition, p. 12e).

(4) Lt. Palmer's testimony that the reporter also checked the public arrest docket every day. (Petition, p. 12e)

(5) The reporter's testimony that it was his usual practice to check the public arrest docket, which was easily available to him, before writing a story. (Petition, p. 12f).

(6) The reporter's assertion that he did not check the public arrest docket this particular day because he had to meet an eleven o'clock deadline, even though the article didn't appear until two (2) days later. (Petition, p. 12f, 12c).

(7) The reporter's admission that he destroyed his notes of his meeting with Lt. Palmer after he learned of this lawsuit. (Petition, p. 12f).

(8) The reporter's admission that he

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failed to file a report with his editor explaining the inaccuracy of the story, even though this was the newspaper's standard procedure. (Petition, p. 12f).

All of this evidence was reviewed by the South Carolina Supreme Court in its unanimous opinion. (Petition, p. 12d-12f). The direct conflict in the reporter's and the police officer's version was resolved by the jury in favor of the police officer. The Court concluded that, in light of the other evidence enumerated above, this was entirely justified.

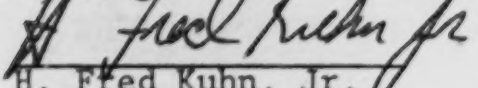
CONCLUSION

This Court, in Bose Corp. v. Consumers Union of U.S., Inc., supra, did not hold that a plaintiff in a libel action must try his case once before a jury in a trial court and, if successful, must try it again a second time before an appellate court on the factual issue of actual malice. The South Carolina Supreme Court in this case independently reviewed the record and held that there was more than sufficient evidence of actual malice to warrant submitting this issue to the jury.

It is accordingly respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MOSS, BAILEY & DORE, P.A.

By: 

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THE BEAUFORT GAZETTE,
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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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The fundamental shortcoming of the Brief in Opposition to Petition for Writ of Certiorari is that it fails to reconcile the requirement of independent and complete judicial review mandated by Bose Corp. v. Consumers Union of U.S., Inc., ____ U.S. _____, 104 S.Ct. 1949, _____ L.Ed. _____ (1984) with the one-sided and abbreviated review which the South Carolina Supreme Court undertook in the pending action. The clear language from the Bose case and the South Carolina Supreme Court's opinion adequately indicate the truly significant scope of the disparity.

Bose requires the following degree of judicial review:

> "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not

> merely a question for the trier of fact. Judges as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice'."

Bose Corp. v. Consumers Union of U.S., Inc., supra at 104 S.Ct. 1965.

The opinion of the South Carolina Supreme Court states in no uncertain terms that its review was considerably less.

> "For the purpose of this appeal this court must view the evidence in the light most favorable to the plaintiff. That evidence raised a jury issue on a factual matter which had been settled by the jury."

Deloach v. Beaufort Gazette Sup.Ct. S.C., Op. No. 22090, April 30, 1984.

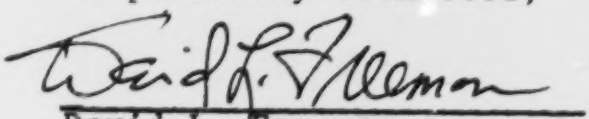
Instead of tackling the central issue squarely, the Respondent sought in its Brief in Opposition to Petition for

Writ of Certiorari to offer evidence in support of the jury verdict. In so doing, it ignored all of the evidence in the record that militated against the verdict. Bose does not allow such an approach. All of the evidence must be reviewed by the court and the review must be independent.

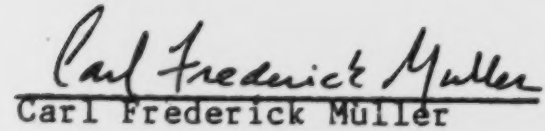
Although courts did review the evidence in libel and slander actions prior to the Bose case, it remained for Bose to articulate explicitly the full contours of the high requisite constitutional standard. The much lower standard applied by the South Carolina Supreme Court was erroneous and, accordingly, the judgment must be vacated and this case must be remanded for

further proceedings consistent with the Bose directive.

Respectfully submitted,



David L. Freeman



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